In the Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-701

CAPERS G. BARR, JR., AND SOUTH CAROLINA STATE PORTS AUTHORITY, PETITIONERS

v.

UNITED STATES OF AMERICA

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE FOURTH CIRCUIT

MEMORANDUM FOR THE UNITED STATES IN OPPOSITION

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1. The International Longshoremen's Association, AFL-CIO, requested the National Mediation Board to investigate a representation dispute among certain employees of the South Carolina State Ports Authority (Pet. App. A3). After conducting a preliminary investigation, the Board determined that it had jurisdiction over the dispute since the Ports Authority, which owns and operates terminal railroads and port facilities in Charleston, South Carolina, is a "carrier" within the meaning of the Railway Labor Act, 45 U.S.C. 151, First (Pet. App. A4).

The Ports Authority, however, refused to grant the Board access to its books and records, which contained information essential to the Board's investigation

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(Pet. App. A4). The United States then instituted this action in the district court seeking an order directing the Ports Authority to produce these documents for the Board's inspection.

The district court, limiting its inquiry to whether the documents sought were "plainly incompetent or irrelevant to any lawful purpose of the National Mediation Board" (Pet. App. A5), ordered the Ports Authority to make the documents available to the Board since the Board had established that "its request for access to the books and records of the Ports Authority [was] not incompetent or irrelevant to the Board's purpose, and not arbitrary, capricious or without foundation" (*ibid*). The court refused to consider at this stage whether the Ports Authority is a "carrier" within the meaning of the Act (*id.* at A4). The court of appeals affirmed *per curiam* (*id.* at A1–A2). The National Mediation Board has not yet certified any organization as the representative of petitioners' employees.

2. There is no reason for further review. The proceedings of the National Mediation Board are only in the investigatory stage and the sole question presented by this case is whether the Board was entitled to access to the books and records of the Ports Authority in order to complete its investigation. Both courts below correctly determined that the Board was entitled to examine these documents because the evidence sought was not incompetent or irrelevant to the Board's investigation. As this Court held in *Endicott Johnson Corp.* v. *Perkins,* 317 U.S. 501, 509, which dealt with

judicial enforcement of an agency subpoena—a situation analogous to this case—

> The evidence sought by the subpoena was not plainly incompetent or irrelevant to any lawful purpose of the Secretary in the discharge of her duties under the Act, and it was the duty of the District Court to order its production for the Secretary's consideration.

Petitioners argue that the courts below should not have required production of these records without first determining whether the Ports Authority was a "carrier" under the Act.[1] *United States* v. *Feaster*, 376 F. 2d 147 (C.A. 5),[2] is directly on point. In *Feaster*, as in this case, a State agency that operated dock facilities including a terminal railroad refused to make its records available to the National Mediation Board during an investigation of a representation dispute, on the ground that it was not a "carrier" within the meaning of the Railway Labor Act. The court there held that when the Board seeks judicial assistance to obtain records in order to carry out the required investigation, the court may not at that time review the Board's administrative determination that the State agency is a "carrier," since judicial resolution of this question must await Board certification of a representative of the employees under 45 U.S.C.

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[1] In *International Longshoremen's Association* v. *North Carolina Ports Authority*, 463 F. 2d 1 (C.A. 4), certiorari denied, November 6, 1972, No. 72–284, the court held that a State ports authority, similarly constituted to the South Carolina Ports Authority in this case, was a "carrier" within the meaning of the Railway Labor Act.

[2] See also *United States* v. *Feaster*, 330 F. 2d 671 (C.A. 5); *United States* v. *Feaster*, 410 F. 2d 1354 (C.A. 5), certiorari denied, 396 U.S. 962.

152, Ninth, after completion of the investigation. 376 F. 2d at 148–151. Otherwise, the basic purpose of the Act to insure "prompt and orderly settlement" of labor disputes, 45 U.S.C. 151a, with "no dragging out of the controversy," *Switchmen's Union* v. *National Mediations Board,* 320 U.S. 297, 305, would be frustrated. As the court of appeals in this case correctly held, "[t]here will be time enough to determine the question of whether the Ports Authority is a carrier * * * after administrative remedies have been exhausted" (Pet. App. A2).[3]

It is therefore respectfully submitted that the petition for a writ of certiorari should be denied.

ERWIN N. GRISWOLD,
Solicitor General.

DECEMBER 1972.

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[3] Thus, this is not the proper occasion to consider petitioners' argument that matters have changed since the Board's initial determination because the Ports Authority now lacks "control" over the terminal railroad facilities in Charleston, South Carolina, which petitioners claim are in a state of flux pending transfer to a State railway commission (Pet. 10). See note 2, *supra.*

U.S. GOVERNMENT PRINTING OFFICE: 1972